U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 22May2002

CASE NUMBER: 2001-LHC-816

OWCP NO.: 07-154499

IN THE MATTER OF

JAMES E. MCLENDON,
Claimant

v.

INGALLS SHIPBUILDING, INC.,
Employer

APPEARANCES:

Jason Embry, Esq.
On behalf of Claimant

Donald P. Moore, Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, brought by James E. McLendon (Claimant) against Ingalls Shipbuilding, Inc. (Employer). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on March 19, 2002, in Gulfport, Mississippi.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced nine exhibits, which were admitted, including: various Department of Labor filings;

medical records from Drs. Drake, Ferrante, Chen, and Fortier-Benson; a functional capacity evaluation; Claimant's deposition; and a list of Claimant's attempts to find employment.[1] Employer introduced nineteen exhibits, which were admitted, including: various Department of Labor filings; vocational reports by Joe Walker and Tommy Sanders; a return to work file; the affidavit of Joey Anderson; photographs of Claimant's work area; video surveillance and reports; documents regarding the Second Injury Fund; the deposition of Robert Haygood; and Claimant's Report of Earnings.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. The date of injury was September 15, 1999;

2. The injury occurred in the course and scope of employment, and an employer-employee relationship existed at the time of the accident;

3. Employer was timely advised of the injury;

4. Notice of controversion was filed timely;

5. Claimant's average weekly wage at the time of the injury was $531.10;

6. Employer paid temporary total disability from September 16, 1999, to February 6, 2000, and again from March 2, 2000, to March 7, 2000, for total compensation paid to date of $7,587.43. Employer paid medical expenses of $8,026.34; and,

7. Claimant's date of maximum medical improvement is February 3, 2000.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Nature and extent of disability;

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[1] References to the transcript and exhibits are as follows: Trial transcript- Tr.__; Claimant's exhibits- CX-__, p.__; Employer exhibits- EX-__, p.__; Administrative Law Judge exhibits- ALJX-__; p.___.

2. Whether Employer offered suitable alternative employment within its facility;

3. Whether suitable alternative employment was identified;

4. Employer's credit for compensation and wages paid;

5. Second Injury Fund relief; and,

6. Interest and attorney's fees.

III. STATEMENT OF THE CASE

A. Chronology

Prior to working for Employer, Claimant served in the Navy as an avionics technician from 1980 to 1983, where he acquired skills in computer installation. (Tr. 19; EX 10, p. 1). After receiving an honorable discharge, Claimant installed satellite dishes. (Tr. 19). Claimant then worked for Water, Gas and Light Commission in Albany Georgia, while his wife went to night school. (Tr. 19). After his wife graduated, she obtained a position with Employer and Claimant moved to Mississippi where he obtained employment with TSI installing telephone systems. (Tr. 19). In 1990, Claimant began to work for Employer as a combination electrician. (Tr. 20; EX 10, p. 1).

In 1995, Claimant suffered a back injury, while working for Employer, when he fell to the bottom of a stairwell carrying telephone cable. (Tr. 21). On April 24, 1995, Claimant began treatment with Dr. Drake, an orthopaedic surgeon, in regards to his injury and complaints of lower back pain. (CX 3, p. 3). Dr. Drake's impression was that Claimant had "mild degenerative disc disease L-5 disc, lumbar spine" and lumbosacral strain. *Id*. at 4.

By July 17, 1995, after conservative treatment and returning Claimant to work, Claimant reported to Dr. Drake that he could not continue working because his Employer placed him in a position where he had to do a lot of driving in a vehicle without shocks. (CX 3, p. 5). The constant bouncing aggravated his back so much that sitting for long periods of time bothered him. *Id*. Opining that Claimant could still work, Dr. Drake issued work restrictions of no driving more than one hour in an eight hour day, and minimally limited his bending, stooping and climbing. *Id*. at 6. Dr. Drake also indicated that Claimant could rarely lift fifty pounds, occasionally lift thirty-five pounds and frequently lift fifteen pounds. *Id*. at 6. On September 15, 1995, Claimant continued to complain of low back pain and Dr. Drake issued new work restriction of: no lifting over thirty pounds, no riding in a car more than four hours in an eight hour day, and no excessive bending, stooping, or climbing. *Id*. On December 4, 1995, Dr. Drake issued a new impression of "nerve root encroachment - lumbar spine." *Id*. at 7.

Due to continuing pain, Dr. Drake opined on January 19, 1996, that Claimant had segmental

instability at the L4 level with possible radiculopathy in the left leg and recommended a discectomy at L5 with fusion, lateral mass, L5 to S1. (CX 3, p. 8). He recommended a laminectomy and a fusion at L5-S1 and, depending on the diagnostic studies, carry the operation to L4-S1. *Id.* On March 18, 1996, Dr. Drake interpreted a new MRI as showing a significant disease at L5 with a disc encroaching on the S1 root. *Id*.

On May 15, 1996, Claimant was admitted to the hospital with a final diagnosis of a herniated nucleus pulposus at L5, left side, encroaching S1 root, and underwent a laminectomy and discectomy, L5 disc, left side with S1 nerve root decompression. (CX 3, p. 11). On July 19, 1996, Claimant was doing excellent following his operation and Dr. Drake authorized Claimant to return to work on July 22, 1996, with work restrictions of no lifting over twenty-five pounds, resuming his job as a maintenance electrician. *Id*. On January 10, 1997, Claimant reported only an occasional flare-up, and Dr. Drake set permanent restrictions of no lifting over fifty pounds on an infrequent basis and no lifting over twenty-five pounds on a frequent basis. *Id*. at 12. Claimant had a five percent permanent partial impairment to his whole body. *Id*.

After recovering from surgery, Employer put Claimant to work in an "eight gang" working on power supplies. (Tr. 22). The equipment weighed about 450 lbs. and Claimant was required to hoist the equipment up. move it fifty feet, and then set it down on a workbench. (Tr. 22). After two month of performing this work, Claimant revisited his doctor who changed his work restrictions. (Tr. 22). Claimant was then transferred to Welding Services. (Tr. 23). On December 26, 1997, Claimant returned with complaints of lower back, buttock, thigh and calf pains, so severe that Claimant had to stop work in November. (CX 3, p. 12-13). Radiographic studies indicated a narrowing of the L5 disc and a MRI showed scar tissue around the L5-S1 disc. *Id*. at 13. Nevertheless, Claimant returned to work.

Claimant's current injury occurred on September 15, 1999, while working in the water treatment purification facility unloading pallets containing eighty pound bags of soda ash. (Tr. 23). While moving a bag, Claimant experienced shooting pains, quit lifting, and made an appointment to see Dr. Drake. (Tr. 24). On September 23, 1999, Claimant reported lower back and bilateral leg pain so severe that he spent half the day resting. (CX 3, p. 14). X-rays showed a narrowing of the L5 disc and Dr. Drake's impression was that Claimant suffered nerve root irritation to the lumbar spine. *Id*. Until further notice, Dr. Drake revoked Claimant' medical authorization to work. *Id*. After an EMG and nerve conduction studies, Dr. Drake opined on November 22, 1999, that the findings were consistent with L5-S1 polyradiculopathy. *Id*. at 17. Because the pain was intolerable and Claimant could not work, Dr. Drake recommended an L5-S1 fusion using threaded cages to relieve problems with the S1 nerve root. *Id*. A second opinion physician, Dr. Charlie Winters, also recommended a total laminectomy with expiration of the S1 nerve roots on both sides, and a fusion at L5-S1 using spine plates instead of threaded cages. *Id*. at 18. On January 8, 1999, Dr. Drake explained to Claimant that surgery only had a fifty percent chance of improving his condition, but such a procedure was reasonable if he was having intractable pain. *Id*. at 19. Claimant elected not to undergo the recommended surgery.

Accordingly, on January 25, 2000, Claimant underwent a functional capacity examination with

Douglas G. Roll. (CX 6, p. 1). Mr. Roll indicated that Claimant neither gave maximum effort nor engaged in symptom magnification. *Id*. Considering positive neurological signs during testing for pain in the L4 -S1 region, Mr. Roll attributed Claimant's poor effort and self-limited performance to that condition. *Id*. The results of the exam revealed that Claimant could lift fifteen pounds and carry twenty pounds, and push/pull forty-five to fifty pounds. *Id*. at 1-2. For non material handling tasks, Claimant could bend, squat, kneel, crawl, stand, walk, climb stairs, and climb ladders on a frequent basis. *Id*. at 2. Claimant could balance and sit on a continuous basis. *Id*.

Following a functional capacity evaluation, Dr. Drake noted on February 3, 2000, that he felt that Claimant was capable of lifting more than fifteen pounds, but opined that he was not a good candidate for continued employment at Employer's facility. (CX 3, p. 20). Specifically, Claimant's bending, stooping, squatting, crawling and kneeling should be limited, not over one to two hours out of an eight hour day and his work should be light. *Id*. Claimant was capable of lifting ten pounds frequently and lifting a maximum of twenty pounds. *Id*. On September 14, 2000, Dr. Drake authored a letter which listed Claimant as having a whole body impairment of twenty percent as a result of his September 15, 1999 work-place injury, which included Claimant's five percent impairment rating from his earlier workplace injury on May 15, 1995. *Id*. at 1.

Claimant returned to Employer's facility where Ms. Wiley, the Employee's Relations Representative, found "suitable" work for Claimant, based on Dr. Drake's restrictions, repairing welding whips. (Tr. 78). Claimant did not think that he would be able to perform the work and took a weeks vacation before reporting to work on February 14, 2000. (EX 9, p. 2-3). On March 30, 2000, Claimant aggravated his condition was taken to the hospital. (Tr. 38-39). Believing that his pain prevented him from continuing to perform his job, Claimant quit on March 15, 2000. (EX 9, p. 11).

On June 8, 2000, Claimant began treatment with Dr. Fortier-Benson for chronic pain due to lumbar radiculitis, pelvic dysfunction and chronic M/S strain. (CX 8, p. 72). Claimant also related that his pain made it difficult for him to do just about anything, but pain medications of Oxycontin, Lorcet 10, and Celebrex helped a lot. *Id*. Dr. Fortier-Benson's impression on July 28, 2000, was that Claimant suffered from post-laminectomy pain syndrome, L5-S1 radiculopathy, spinal stenosis, SI joint dysfunction and facet joint dysfunction, and he planed a trial of injection therapy. *Id*. at 61.

Throughout the fall and winter of 2000-01, Claimant periodically visited Dr. Fortier-Benson's office, consistently rating his pain between five and seven on a zero to ten scale. (CX 8, p. 37, 45, 54, 56). In August 2000, Dr. Fortier-Benson opined that Claimant had degenerative disc disease and lumbosacral neuralgia. *Id*. at 56. On September 18, 2000, after reviewing MRI and EMG tests, Dr. Fortier-Benson stated that Claimant has a degenerative herniated disc at L5-S1 and had evidence of lumbosacral radiculopathy most prominently in the S1 root. *Id*. at 46. If Claimant decided to have surgery, Dr. Fortier-Benson recommended a transverse lumbar inter-body fusion at L5-S1. *Id*. at 47.

By August 2001, Claimant experienced increased pain, rating it a "seven to eight," and he was scheduled for injection therapy which decreased his pain level back to "five." (CX 8, p.30-31, 34). On September 19, 2001, Claimant indicated that he was no longer working because of his chronic pain and would like to apply for social security. *Id*. at 29. By October 22, 2001, Claimant stated that he was working some, and by November 28, 2001, although experiencing an increase in pain levels, Claimant felt as if he was functioning. (CX 8, p. 23, 26). On January 2, 2002, Claimant rated his pain a "four" and reported improved activities of daily living. *Id*. at 20.

B. Claimant's Testimony

Claimant described his job at the Welding Services Maintenance facility as follows:

A: Okay. After arriving in the morning, usually I would clear my work area of any cables that had been left there from the different shifts from the night before. They usually were piled anywhere from 5 to 30 cables, welding cables, laying on the floor in this building. I would unroll them, untangle them, cut the bad cables, unroll new cable from various new cable reels, which some of them were hanging on a wall, some of them were stacked on the floor. I would unroll the cable and cut these cables to the proper length, roll the cable back up and tape them, and then store them on storage shelves. Then I would go outside down some steps and open a bin - - which, it's a four-by-four box, about four feet high - - where the rest of the damaged cables were kept.

I would take the cables out of that box. I'd have to untangle them, pull them out of the box, drag them, separate them, bring them back into the building, and try to salvage any good pieces and then repair them with new parts which are stored in bins along the walls inside of the building.

. . . .

Q: Would you have any trouble retrieving the leads from the box?

A: Yes. Occasionally, there a few right on top that you can just pull out. The best way that I can describe it would be like taking a bunch of drop cords or power cords and putting them into a big box and then reaching in to pull them out. Naturally they're quite tangled up. There's quite a bit of pulling involved and bending into the box, and it got to be painful for me to be bending and pulling all day.

Then once I'd get the cables inside, if the box wasn't completely full, normally there was a huge pile of these cables inside that building to where I had to actually get down on my knees, untangle these things and stretch them out, and pull new cable and - -

Q: . . . . With regard to retrieving the wire leads from the bin, were you given or offered any kind of hook or something to pull them out with?

A: No. I have heard of this in the last few weeks, but not any substantial equipment. I don't see where a hook of any sort would be beneficial to pull these cables out of that box.

(Tr. 30-36).

In theory the whips were individually tied to prevent entanglement, but in actuality Claimant stated that they were all tangled together. (Tr. 48). Claimant also stated that he was required to pull out fifty foot strands of cable with diameters ranging up to an inch. (Tr. 36-37). Often welding boxes would be piled on his workbench and claimant would have to remove them. (Tr. 37). Spare parts were stacked from floor to ceiling against a wall and Claimant frequently had to bend down to pick up parts. (Tr. 39). Claimant further testified that he told his supervisors that he was having difficulty performing the work, but was told the only thing he could do was to have his doctor change his restrictions. (Tr. 36). On his last day of employment, Claimant bent over to pick up a cable when "it just felt like lighting hit [him] in [his] low back and [his] whole left leg went numb and part of - - even on the right side." (Tr. 38-39). Since he could not change his circumstances, and Dr. Drake felt as if his restrictions were adequate, Claimant quit working for Employer. (Tr. 38).

Following his job with Employer, Clamant did not work anywhere else, but he did have rental some rental property and property for sale. (Tr. 42-43). Estimated monthly earnings for four occupied rental properties totaled twelve to fifteen hundred dollars a month. (Tr. 59). Claimant performed all the light work and used the services of a tenant when any heavy work was necessary. (Tr. 43). The rental properties and the income from his spouse are currently his only sources of income. (Tr. 43). Claimant testified that he tried to find other employment by word of mouth at Handyman Services in Ocean Springs, and B.J.'s Painting and Contracting, and he had submitted written applications to local casinos, auto part places, Lowes, and Bailey's. (Tr. 44).

Regarding a comment written by Dr. Fortier-Benson that Claimant was working part-time doing air conditioning work, Claimant testified that he told Dr. Fortier-Benson that he was trying to start his own business, but he never got any response and never obtained any work. (Tr. 51). Claimant did clean his own air conditioning coils, and he cleaned his neighbors once but refused to accept any money for the job. (Tr. 53-54).

Since suffering his work-place accident in 1999, Claimant stated that he was no longer active in sports, he had trouble sleeping, stress in his marriage, and depression. (Tr. 45). Many former tasks, such as working on old automobiles, he is no longer able to perform. (Tr. 45). Use of prescription drugs to numb his chronic pain causes Claimant to become childish and affects his ability to concentrate. (Tr. 73).

C. Testimony of Melinda Wiley

Ms. Wiley had worked for Employer for twenty-nine years, and for the past ten years she held the title of Employee Relations Representative. (Tr. 74). Her job entailed assisting employees who had permanent work restrictions in returning to work. (Tr. 75). Ms. Wiley worked with Claimant on three separate occasions over the years finding him suitable work based on his permanent restrictions. (Tr. 75). To find a position for Claimant, Ms. Wiley contacted the head of the Electrical Department to review and discuss Claimant's personnel file, abilities and restrictions. (Tr. 78). Discussing the matter with Charlie Hudson, the superintendent of Claimant's craft, Ms. Wiley placed Claimant in the Welding Repair trailer working under Vince Atkinson. (Tr. 78). Although Claimant testified that he called Ms. Wiley several times, Ms. Wiley had no record of any conversations after Claimant's initial placement. (Tr. 82). If Claimant had called, Mr. Wiley's practice was to make a written record and she had no records that Claimant had ever called her complaining that his work was not suitable for his restrictions. (Tr. 82, 96). If Claimant had called her, she would have investigated Claimant's work activities. (Tr. 83).

Ms. Wiley's information concerning the job requirements of Claimant's position came directly from Mr. Walker. (Tr. 87). Ms. Wiley never observed Claimant performing his job. (Tr. 87). In preparation for the hearing, Ms. Wiley spent about thirty minutes observing the whips being repaired and she did not see any difficulties obtaining whips from the wooden bin. (Tr. 93).

D. Testimony and Vocational Report of Joseph Walker

Joseph Walker, a vocational rehabilitation counselor who works for the Department of Labor, Office of Workers' Compensation Programs, provided vocational expert services in regards to Claimant's return to work for Employer. (Tr. 99, 101; EX 9, p. 1). Following Claimant's 1995 injury, Mr. Walker followed Claimant's progress and stated that Claimant did not have any recorded grievances and the Department of Labor Rehabilitation Office closed his file noting that Claimant's return to work was satisfactory. (Tr. 105).

Regarding the circumstances surrounding Claimant's return to work in February-March 2000, Mr. Walker reported that Claimant was provided a modified position in the Maintenance Department where he would be assigned bench-type work making repairs to welding whips. (EX 9, p. 2). Claimant expressed doubt about his ability to perform that job and took several days of vacation before finally reporting to work on Monday February 14, 2000. *Id*. at 2-3. On March 1, 2000, Claimant had complained to his supervisor, Mr. Atkinson, that he was experiencing back and leg pain after a fall and Claimant was taken by ambulance to Employer's medical facility where treatment was refused because Claimant had an outside physician. *Id*. at 5.

On March 3, 2000, Mr. Walker testified that he attempted to view Claimant on the work site, but Claimant was not present after he experienced the fall on March 1, 2000. (Tr. 107-08). Viewing Claimant's workstation, Mr. Walker noticed that Claimant had a stool to sit upon, and that Claimant

was required to bend over and pick up welding whips, approximately six to ten feet long, which according to Mr. Haygood, weighed "twenty to thirty pounds." (Tr. 115, 122; EX 9, p. 6). Mr. Walker did not seek clarification of Haygood's statement regarding the weight of the whips, but opined that Mr. Haygood was referring to the weight of the welding boxes and not the whips. (Tr. 115-116). When Mr. Walker also observed whips awaiting repairs some were neatly tied and others looked like "spaghetti." (Tr. 124).

In Mr. Walker's understanding, a restriction limiting lifting and bending to no more than two hours in an eight hour day fell within the labor classification of "limited" bending. (Tr. 131). Opining that an average whip took thirty minutes to repair, Claimant would repair sixteen whips in an eight hour day, necessitating Claimant bending over at least sixteen times a day to retrieve a whip from the box. (Tr. 132). Mr. Walker opined that with the opportunity to perform repair work with light materials, the position was suitable modified activity and comported with Claimant's work restrictions set by Dr. Drake. (Tr. 118; EX 9, p. 6). In a telephone conversation, however, Claimant indicated to Mr. Walker that the frequency of bending, stooping, and pulling welding whips out of the box was greater than the "limited" statement as related in his work restrictions. (EX 9, p. 9). Claimant acknowledged that there was an extension handle with a hook at work that he could use to retrieve items out of the box. *Id*. In an average day Claimant would repair anywhere from ten to twenty whips. *Id*. at 10-11. On March 15, 2000, Claimant elected to "clear out" and no longer work for Employer so Mr. Walker never had the opportunity to actually view Claimant performing this work. (Tr. 109; EX 9, p. 11).

E. Exhibits

(1) Medical Records of Dr. John Drake

On April 24, 1995, Claimant underwent treatment with Dr. Drake, an orthopaedic surgeon, in regards to complaints of lower back pain. (CX 3, p. 3). Dr. Drake related the Claimant spent half of the day resting because of his symptoms, and that physical therapy was not helpful. *Id*. Based off a physical examination, x-rays taken on March 30, 1995, and an MRI performed on April 12, 1995, Dr. Drake's impression was that Claimant had "mild degenerative disc disease L-5 disc, lumbar spine" and lumbosacral strain. *Id*. at 4. Dr. Drake's plan was to start an exercise program and if it went well then Claimant could return to light duty work. *Id*.

On May 8, 1995, Claimant reported that he had trouble bending forward and problems controlling urination. (CX 3, p. 4). Because his condition was deteriorating, Dr. Drake did not think Claimant was capable of returning to work even with restrictions. *Id*. at 5. By June 16, 1995, however, Claimant reported much improvement and expressed a desire to return to work. *Id*. Claimant stated that he could work around his complaints at work, and Dr. Drake supported his effort, issuing a new impression of improving low back strain. *Id*.

By July 17, 1995, Claimant reported that he could not continue working because his Employer placed him in a position where he had to do a lot of driving in a vehicle without shocks. (CX 3, p.

5). The constant bouncing aggravated his back so much that sitting for long periods of time bothered him. *Id*. Opining that Claimant could still work, Dr. Drake issued work restrictions of no driving more than one hour in an eight hour day, and minimally limited his bending, stooping and climbing. *Id*. at 6. Dr. Drake also indicated that Claimant could rarely lift fifty pounds, occasionally lift thirty-five pounds and frequently lift fifteen pounds. *Id*. at 6.

On September 15, 1995, Claimant continued to complain of low back pain. (CX 3, p. 6). Dr. Drake reported that Claimant felt as if he had to return to work regardless of his physical capabilities because a second opinion physician returned him to full duty, Employer had ended his compensation payments and told Claimant he had to repay some of the benefits given to him. *Id*. Dr. Drake issued new work restriction, no lifting over thirty pounds, no riding in a car more than four hours in an eight hour day, and no excessive bending, stooping, or climbing, in a effort to get Claimant back to work. *Id*.

By October 13, 1995, Claimant reported that he was able to return to work, with the help of his attorney, but he continued to complain of severe pain. (CX 3, p. 7). Dr. Drake credited those continuing reports of pain and ordered more diagnostic studies. *Id*. A myelogram was normal but a CT scan revealed an abnormal disc at L5. *Id*. The L5 abnormality, however, was not serious and Dr. Drake recommended against surgery in favor of a steroid injection, performed on November 17, 1995, and back strengthening exercises. *Id*. at 7-8. Claimant reported that the steroid injection helped for a few days but produced no lasting effects. *Id*. at 8. On December 4, 1995, Dr. Drake issued a new impression of "nerve root encroachment - lumbar spine." *Id*.

On December 12, 1995, Claimant underwent a second steroid injection, and reported good results. (CX 3, p. 8). On December 21, 1995, Claimant received a third injection. *Id*. at 9. After the pain returned, Dr. Drake opined on January 19, 1996, that Claimant had segmental instability at the L4 level with possible radiculopathy in the left leg and recommended a discectomy at L5 with fusion, lateral mass, L5 to S1. *Id*. Before performing that operation, however, Dr. Drake wanted a second opinion and wanted Claimant to see a urologist about a recent onset of hematuria. *Id*.

On February 26, 1996, Claimant requested an immediate appointment with Dr. Drake concerning severe pain which caused Claimant to stop working. (CX 3, p. 10). Dr. Drake opined that the severe pain was brought on by nerve root encroachment in the lumbar spine. *Id*. Dr. Drake revoked Claimant's return to work status and recommended a laminectomy and a fusion at L5-S1 and, depending on the diagnostic studies, carry the operation to L4-S1. *Id*. On March 18, 1996, Dr. Drake interpreted a new MRI as showing a significant disease at L5 with a disc encroaching on the S1 root. *Id*. Opining that a laminectomy and discectomy was the best course of action, Dr. Drake no longer thought a fusion was necessary. *Id*.

On May 15, 1996, Claimant was admitted to the hospital with a final diagnosis of a herniated nucleus pulposus at L5, left side, encroaching S1 root, and underwent a laminectomy and discectomy, L5 disc, left side with S1 nerve root decompression. (CX 3, p. 11). On July 19, 1996, Claimant was doing excellent following his operation and Dr. Drake authorized Claimant to return to work on July

22, 1996, with work restrictions of no lifting over twenty-five pounds and stated that he could resume his job as a maintenance electrician. *Id*. On January 10, 1997, Claimant reported only an occasional flare-up, and Dr. Drake set permanent restrictions of no lifting over fifty pounds on an infrequent basis and no lifting over twenty-five pounds on a frequent basis. *Id*. at 12. Claimant had a five percent permanent partial impairment to his whole body. *Id*. On December 26, 1997, Claimant returned with complaints of lower back, buttock, thigh and calf pains, so severe that Claimant had to stop work in November. *Id*. at 12-13. Radiographic studies indicated a narrowing of the L5 disc and a MRI showed scar tissue around the L5-S1 disc. *Id*. at 13.

On September 23, 1999, Claimant was again treated by Dr. Drake after suffering a work place accident moving a fifty pound bag of chemicals. (CX 3, p. 14). Claimant reported lower back and bilateral leg pain so severe that he spent half the day resting. *Id*. X-rays showed a narrowing of the L5 disc and Dr. Drake's impression was that Claimant suffered nerve root irritation to the lumbar spine. *Id*. Until further notice, Dr. Drake revoked Claimant' medical authorization to work. *Id*. After an EMG and nerve conduction study, Dr. Drake opined on November 22, 1999, that the findings were consistent with L5-S1 polyradiculopathy. *Id*. at 17. Because the pain was intolerable and Claimant could not work, Dr. Drake recommended an L5-S1 fusion using threaded cages to relieve problems with the S1 nerve root. *Id*. A second opinion physician, Dr. Charlie Winters, also recommended a total laminectomy with expiration of the S1 nerve roots on both sides, and a fusion at L5-S1 using of spine plates instead of threaded cages. *Id*. at 18. On January 8, 1999, Dr. Drake explained to Claimant that surgery only had a fifty percent chance of improving his condition, but such a procedure was reasonable if he was having intractable pain. *Id*. at 19.

Following a functional capacity evaluation, Dr. Drake noted on February 3, 2000, that he felt that Claimant was capable of lifting more than fifteen pounds , but opined that he was not a good candidate for continued employment at Employer's facility. (CX 3, p. 20). Specifically, Claimant's bending, stooping, squatting, crawling and kneeling should be limited, not over one to two hours out of an eight hour day and his work should be light. *Id*. Claimant was capable of lifting ten pounds frequently and lifting a maximum of twenty pounds. *Id*. On September 14, 2000, Dr. Drake authored a letter which listed Claimant as having a whole body impairment of twenty percent as a result of his September 15, 1999 work-place injury, which included Claimant's five percent impairment rating from his earlier workplace injury on May 15, 1996. *Id*. at 1.

(2) Medical Records of Dr. Joe Chen

On November 3, 1999, Claimant treated with Dr. Chen at Sun Coast Pain Management Center. (CX 5, p. 1). Claimant related to Dr. Chen that on a zero to ten scale his pain level was a "five." *Id*. Dr. Chen administered an epidural steroid in hope of reducing that pain level, which only accomplished temporary relief, and he then administered selective S1 left nerve root block to help determine the role that the nerve played in Claimant's overall pain. *Id*. at 2-3. Dr. Chen concluded that Claimant's pain was secondary to the S1 nerve root. *Id*.

(3) Functional Capacity Evaluation

Douglas G. Roll conducted a functional capacity evaluation on January 25, 2000. (CX 6, p. 1). Mr. Roll indicated that Claimant neither gave his maximum effort nor engaged in symptom magnification. *Id*. Considering positive neurological signs during testing for pain in the L4 -S1 region, Mr. Roll attributed Claimant's poor effort and self-limited performance to that condition. *Id*. The results of the exam revealed that Claimant could lift fifteen pounds and carry twenty pounds, and push/pull forty-five to fifty ponds. *Id*. at 1-2. For non-material handling tasks, Claimant could bend, squat, kneel, crawl, stand, walk, climb stairs and climb ladders on a frequent basis. *Id*. at 2. Claimant could balance and sit on a continuous basis. *Id*.

(4) Medical Records of Dr. Robert Fortier-Benson

On June 8, 2000, Claimant began treatment with Dr. Fortier-Benson, at the Center for Functional Medicine, for chronic low back and left leg pain due to lumbar radiculitis, pelvic dysfunction and chronic M/S strain. (CX 8, p. 72). Claimant described his severe pain as sharp, dull, burning, aching, throbbing, tingling, stabbing and spasm. *Id*. at 63. The pain was both constant and intermittent and made worse on movement. *Id*. Claimant also related that his pain made it difficult for him to do just about anything, but pain medications of Oxycontin, Lorcet 10, and Celebrex helped. *Id*. Although Claimant stated the surgery had helped his pain at first, his pain level was much worse after his surgery. *Id*.

Claimant also stated that he was working part time as an air-conditioning service man and could no longer perform his former job with Employer because of his pain even though Employer had allowed him to return and offered work within his restrictions. (CX 8, p. 65). Dr. Fortier-Benson's impression on July 28, 2000, was that Claimant suffered from post-laminectomy pain syndrome, L5-S1 radiculopathy, spinal stenosis, SI joint dysfunction and facet joint dysfunction, and he planed a trial of injection therapy. *Id*. at 61.

On August 16, 2000, Claimant returned to Dr. Fortier-Benson and even though he rated his pain a "six" out of ten, Claimant elected not to pursue injection therapy because he had not had success with that treatment in the past. (CX 8, p. 56). Instead, Dr. Fortier-Benson referred Claimant to an orthopedist, Dr. Whitecloud for an independent medical examination to determine if there was some stenosis of the formen at L5-S1. *Id*. Dr. Fortier-Benson's new impression was that Claimant had degenerative disc disease and lumbosacral neuralgia. *Id*.

On September 11, 2000, Claimant returned to Dr. Fortier-Benson, rating his pain level as a "seven." (CX 8, p. 54). After reviewing MRI and EMG tests, Dr. Fortier-Benson stated on September 18, 2000, that Claimant had a degenerative herniated disc at L5-S1 and had evidence of lumbosacral radiculopathy most prominently in the S1 root. *Id*. at 46. If Claimant decided to have surgery, Dr. Fortier-Benson recommended a transverse lumbar inter-body fusion at L5-S1. *Id*. at 47. By November 20, 2000, Claimant's pain subsided to a level "five" with an adjustment of pain medication, and that level of pain remained steady through February 7, 2001. *Id*. at 37, 45. By August 2001, however, Claimant experienced increased pain, rating it a "seven to eight," and he was

scheduled for injection therapy which decreased his pain level back to "five." *Id*. at 30-31, 34. On September 19, 2001, Claimant indicated that he was no longer working because of his chronic pain and would like to apply for Social Security. *Id*. at 29.

By October 22, 2001, Claimant stated that he was working some, and by November 28, 2001, although experiencing an increase in pain levels, Claimant felt as if he was functioning. (CX 8, p. 23, 26). On January 2, 2002, Claimant rated his pain a "four" and reported improved activities of daily living. *Id*. at 20.

(5) Claimant's Employment Search

On April 25, 2001, Claimant applied for jobs at: Coastal Energy, Fast Lane, Isle of Capri Casino, and New Place Casino. (CX 9, p. 1). Between January 2-3, 2002, Claimant applied for jobs at: Lowes, Blockbuster, Bailey Home Center, K-Mart and Boomtown Casino. *Id*. at 2. Claimant was not hired for any of these positions. (Tr. 44).

(6) Vocational Reports of Tommy Sanders

On May 23, 2000, Mr. Sanders, a certified rehabilitation counselor, conducted a hypothetical vocational assessment and labor market survey. (EX 10, p. 1). Mr. Sanders noted that Claimant's prior work history consisted of serving in the Navy as an avionics technician from 1980 to 1983, where he acquired skills in computer installation. *Id*. Following the Navy, Claimant worked as an integration technician, PBX installer technician, systems control and data acquisition technician, and satellite system installer before going to work with Employer in 1990 as a combination electrician. *Id*. Considering Claimant's age, education, prior work history, work restrictions, and medical reports, Mr. Sanders opined that Claimant was not able to resume his former employment as a combination electrician, but was capable of entry level skilled/unskilled positions such as a desk clerk trainee, night auditor trainee, customer service representative, electronic goods, electrical/electronic bench repair, convenience store cashier and various forms of security. *Id*. at 2. In the hypothetical labor market survey, Mr. Sanders located specific jobs in Claimant's locality:

Country Inn and Suites	Night Auditor Trainee	$6.00
Pinkerton Security	Gate Guard	$5.90
Burins International Security	Security Guard	$7.50

(EX 10, p. 2-3).

Mr. Sanders also performed a hypothetical labor market survey retroactive to February 2000. (EX 10. p. 3). Specifically, he located the following jobs:

Coastal Energy	Booth Cashier	$5.25
Pinkerton Security	Security Guard	$5.25

(EX 10, p. 3).

Mr. Sanders noted that Claimant may be well qualified for the positions he listed, but, Mr. Sanders would first recommend interviewing Claimant to determine specific job duties in prior occupations. *Id*.

On May 11, 2001, Mr. Sanders conducted a follow-up hypothetical labor market survey following Dr. Drake's work restrictions set on February 3, 2000, and reiterated on September 14, 2000. (EX 10, p, 4). Mr. Sanders contacted prospective employers, related Claimant's skills, ability, age, education, prior work experience, and medical condition and the following prospective employers were receptive to considering Claimant for employment opportunities:

Pinkerton Security	Security Guard	$6.50
American Citadel	Security Guard	$7.00
Coastal Energy	Booth Attendant	$6.15
Cowboy Maloney	Sales Representative	$650 every two weeks

(EX 10, p. 5).

(7) Claimant's Employment Records

On February 7, 2000, Claimant signed an acknowledgment of his work restrictions and that he understood that if he had any complications, or if he felt that he had been "worked out" of his restrictions, he would call his return-to-work coordinator, Ms. Wiley. (EX 11, p. 5). On February 9, 2000, Joseph Anderson, a claims manager for Employer received a telephone call from Claimant concerning what would happen if he quit work. (EX 12, p. 1). Claimant advised Mr. Anderson that Employer had provided him a job within his restrictions but that Claimant did not think he could perform that job. *Id*. On March 9, 2000, Claimant authored a letter to Dr. Drake explaining that the work Employer had assigned him in the Welding Maintenance Shop was too difficult for him in light of his pain. (EX 11, p. 2). Specifically, Claimant stated:

> The damaged lines are brought in and dumped into a big bin that is 4'x4'x4' deep. My job would be to pull them out of the bin, untangle them, drag them into the shop area, and repair or rebuild them. The job requires lots of bending, twisting, walking, pulling, and dragging. It takes a good deal of upper body strength to undo the nuts and bolts that hold the welding equipment together. I used to be good at working like this but from the way my legs and back feel, I cannot do this work anymore without pain and difficulty. . . . [I] worked from February 14th through March 1st. . . . My left leg and foot bothered me quite a lot, not to mention pain in my lower back. I was unable to get a good night sleep during the entire period. . . . I absolutely could not bear the pain in my low back. I could not continue the job and I could not even walk out of there if I wanted to.

(EX 11, p. 2).

(8) Surveillance Report of Terrell Miceli Investigations

An investigator from Terrell Miceli Investigations maintained surveillance of Claimant on December 17 & 20, 2001. (EX 15). During the investigation video documentation was obtained as Claimant engaged in various activities including "walking in a normal gait; entering, exiting and driving a vehicle; pushing, running and hopping onto a shopping cart; bending at the waist; loading several objects of various size and weight into his vehicle; squatting at the knees; carrying and using tools; etc." *Id*. at 2.

(9) Deposition of Robert Haygood

Claimant noticed the deposition of Robert Haygood, a twenty-seven year employee at Ingalls specializing in maintaining electrical equipment. (EX 17, p. 4). Mr. Haygood, Claimant and two other employees on light duty worked in an extension building for welding services repairing light weight whips for welding boxes - a position that "was not a straining-type job." *Id*. at 5-7. Broken whips were dropped in a 4'x 4' wooden box at the end of the second shift, and Claimant's job was to pull a whip out of the box, repair it and put it on a shelf. *Id*. at 7. Additionally, Employer provided the use of a hook for Claimant so that he would not have to bend over the box to lift the whips out. *Id*. at 8. Most of the whips were taped to prevent tangling. *Id*. at 9.

Different type whips would be deposited in the wooden box for immediate repair. The Oxo whip, weighed seven pounds, and three different types of Gilliland whips weighed anywhere from four to six pounds each. (EX 17, p. 11). Repairs consisted of fixing gas and electrical lines, to replacing tubing and liner. *Id*. at 12. Clamant's workbench was five foot long, three foot wide and stood approximately four feet off the ground. *Id*. at 13. Claimant also had a stool, electrical equipment, and containers for nuts and bolts. *Id*. There was no set amount of whips to repair each day and Claimant could work at his own pace. *Id*. at 27. Whenever there was a rush, all the employees in the building would work on the whips, at their own pace. *Id*.

Mr. Haygood was present the day Claimant was transported out of the maintenance room by an ambulance. (EX 17, p. 14). Mr. Haygood stated that Claimant could not move because he was in pain, so Mr. Haygood called the supervisor and that was the last day that Mr. Haygood saw Claimant. *Id*. at 14-15. Mr. Haygood had no knowledge of any accident or event that occurred to start the episode. *Id*. at 15.

IV. DISCUSSION

A. Contention of the Parties

Claimant contends that he was unable to perform the job Employer provided to him in its facility due to a pattern of further or increased physical problems associated with his post-injury employment. Specifically, the job required Claimant to stoop, bend, pull, and pick-up things that were on the floor and in a storage bin, activities that cause so much pain that Claimant was forced to resign. Considering the fact that Claimant made a diligent job search following his resignation, clamant contends that he is entitled to permanent total disability based on an undisputed average weekly wage of $531.10.

Employer argues that Claimant is not entitled to any permanent disability benefits because Employer returned him to suitable employment at its facility which Claimant did not diligently perform. Specifically, the offered job was necessary to Employer's business and within the work restrictions set by Claimant's treating physician. Additionally, Employer contends that Claimant's actions show that he was not interested in returning to work because he took a week of vacation before starting, tried to get his treating physician to change his work restrictions, contacted the claims adjuster to see what would happen if he quit, and he voluntarily resigned from his employment. Accordingly, Claimant suffered no loss of wage earning capacity. Employer also argues that Claimant did not make a credible witness in light of the many discrepancies in the record. Alternatively, Employer asserts that it established suitable alternative employment in the open labor market through the vocational rehabilitation reports of Mr. Sanders, and that Claimant did not conduct a diligent job search. Finally, Employer argues that it is entitled to Second Injury Fund Relief because Claimant suffered from a pre-existing disability that combined with his present work related injury to cause a substantially greater disability than that which would have resulted from the subsequent work-related injury alone.

A. Credibility

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, 88 S. Ct. 1140, 1145-46, 20 L. Ed. 2d 30 (1968); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981); *Todd Shipyards Corporation v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962). A claimant's discredited and contradicted testimony is insufficient to support an award. *Director, OWCP v. Bethlehem Steel Corp.*, 620 F.2d 60, 64-65 (5th Cir. 1980); *Mackey v. Marine Terminals Corp.*, 21 BRBS 129, 131 (1988); *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981).

Employer highlighted several instances in the record to demonstrate that Claimant is not a credible witness:

> 1. Claimant testified at trial that prior to his 1999 accident, he was being worked outside of his restrictions stating it was "debatable" whether the job was within his restrictions[.] (TT. 66). Claimant has reported to Dr. Drake in 1999 that he was

doing well and working within his restrictions prior to his September 1999 injury.

2. Claimant contends that he had to perform excessive bending and no accommodations were made, such as a hook, for him to perform his job. According to the testimony of Joe Walker and Robert Haygood, it is clear that a hook was provided to Mr. McLendon for obtaining whips out of the four by four box to avoid bending.

3. Claimant contends that he called Melinda Wiley on at least three occasions in the two weeks that he returned to work complain of problems. Melinda Wiley had no record of speaking with claimant or having any messages from claimant despite the fact that she has an answering machine that is on 24 hours a day.

4. Claimant's trial testimony was inconsistent with his deposition testimony regarding job search efforts since leaving Ingalls, He led this Court to believe that he had applied for numerous jobs after leaving Ingalls but had testified in deposition that more than a year following his release to return to work, he had yet to submit one single written application.

5. Claimant also admitted for the first time at trial that he had attempted to start his own air conditioning repair business. He denied he did any work as an air conditioning repairman. He had failed to mention anything about air conditioning repair work in his deposition and had advised Dr. Fortier-Fortier-Benson that he was self-employed as an air conditioning repairman and had worked as such for six months.

6. Claimant is shown on video tape bending and lifting with no apparent signs of distress while measuring materials at a home improvement center.

7. Claimant was evasive about the number of rental properties he owns and the income derived from same. Claimant apparently does quite well income-wise considering he has received no workers' compensation benefits since March of 2000 yet he owns a large fishing boat, two newer model vehicles and seven or more rental properties.

Employer's Br., p. 22-23

Several of Employer's contentions concerning Claimant's credibility have merit. Claimant did waffle on whether his job before the September 1999 injury fell within his work restrictions. (Tr. 66, 76). Also, Claimant gave inconsistent statements regarding the weight of the chemical bags he was moving prior to his September 1999 injury - describing them as one-hundred pound bags on the day of trial - while telling his treating physician they were fifty pound bags. (Tr. 68; EX 5, p. 1).

Claimant's assertion that he was not provided with a hook is directly contradicted by the testimony of Robert Haygood, and Joe Walker. (EX 9, p. 9; EX 17, p. 8). Likewise, Melinda Wiley directly contradicted Claimant's assertion that he repeatedly telephoned her to complain that his alternative job was too painful for him to perform. (Tr. 36, 82). Also, when directly asked about his rental income, Clamant was vague, relating the rental value for three units, but not relating his income for those units nor his income from other properties that were for sale. (Tr. 42).

The other factors mentioned by Employer are less egregious. I was not impressed by the video tape as furthering either Employer's or Claimant's arguments. Claimant's assertion that he had not made any money as an air conditioning repairman was uncontradicted at the hearing, but not receiving any money for self-employment is no excuse for telling Employer's attorney that he was not working. Claimant presented no corroborating evidence regarding his oral job search, and as such I accord his statements little weight. Accordingly, based on the record as a whole, I find that Claimant made a less than credible witness.

B. Nature and Extent of Injury and Date of Maximum Medical Improvement.

Claimant seeks temporary total disability benefits from September 15, 1999, to February 3, 2000, and permanent total disability benefits thereafter. Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981). Here, Claimant elected no to undergo further surgery, and the parties stipulated that Claimant reached maximum medical improvement on February 3, 2000. (ALJX 1).

B(1) Nature of Claimant's Injury

On April 24, 1995, Claimant underwent treatment with Dr. Drake, an orthopaedic surgeon, in regards to complaints of lower back pain. (CX 3, p. 3). Based off a physical examination, x-rays taken on March 30, 1995, and an MRI performed on April 12, 1995, Dr. Drake's impression was that Claimant had "mild degenerative disc disease L-5 disc, lumbar spine" and lumbosacral strain. *Id*. at 4. By October 13, 1995, Claimant reported that he continued to experience severe pain. *Id*. at 7. A myelogram was normal but a CT scan revealed an abnormal disc at L5. *Id*. The L5 abnormality, however, was not serious and Dr. Drake recommended against surgery in favor of a steroid injection, performed on November 17, 1995, and back strengthening exercises. *Id*. at 7-8. On December 4, 1995, Dr. Drake issued a new impression of "nerve root encroachment - lumbar spine." *Id*.

After Claimant's pain returned following injection therapy, Dr. Drake opined on January 19, 1996, that Claimant had segmental instability at the L4 level with possible radiculopathy in the left leg and recommended a discectomy at L5 with fusion, lateral mass, L5 to S1. *Id*. On February 26, 1996, Claimant requested an immediate appointment with Dr. Drake concerning severe pain which caused Claimant to stop working. (CX 3, p.10). Dr. Drake opined that the severe pain was brought on by nerve root encroachment in the lumbar spine. *Id*. Dr. Drake recommended a laminectomy and a fusion at L5-S1 and, depending on the diagnostic studies, carry the operation to L4-S1. *Id*. On March 18, 1996, Dr. Drake interpreted a new MRI as showing a significant disease at L5 with a disc encroaching on the S1 root. *Id*.

On May 15, 1996, Claimant was admitted to the hospital with a final diagnosis of a herniated nucleus pulposus at L5, left side, encroaching S1 root, and underwent a laminectomy and discectomy, L5 disc, left side with S1 nerve root decompression. (CX 3, p. 11). On January 10, 1997, Claimant reported only an occasional flare-up. *Id*. at 12. On December 26, 1997, Claimant returned with complaints of lower back, buttock, thigh and calf pains, so severe that Claimant had to stop work in November. *Id*. at 12-13. Radiographic studies indicated a narrowing of the L5 disc and a MRI showed scar tissue around the L5-S1 disc. *Id*. at 13.

On September 23, 1999, Claimant was again treated by Dr. Drake after suffering a work place accident moving a heavy bags of chemicals. (CX 3, p. 14). X-rays showed a narrowing of the L5 disc and Dr. Drake's impression was that Claimant suffered nerve root irritation to the lumbar spine. *Id*. After an EMG and nerve conduction studies, Dr. Drake opined on November 22, 1999, that the findings were consistent with L5-S1 polyradiculopathy. *Id*. at 17. Because the pain was intolerable and Claimant could not work, Dr. Drake recommended an L5-S1 fusion using threaded cages to relieve problems with the S1 nerve root. *Id*. A second opinion physician, Dr. Charlie Winters, also recommended a total laminectomy with expiration of the S1 nerve roots on both sides, and a fusion at L5-S1 using of spine plates instead of threaded cages. *Id*. at 18. On January 8, 1999, Dr. Drake explained to Claimant that surgery only had a fifty percent chance of improving his condition, but such a procedure was reasonable if he was having intractable pain. *Id*. at 19. On November 3, 1999, Dr. Chen concluded that Claimant's continued pain was secondary to the S1 nerve root. (CX 5, p. 1).

On June 8, 2000, Claimant began treatment with Dr. Fortier-Benson, at the Center for Functional Medicine, for chronic low back and left leg pain due to lumbar radiculitis, pelvic dysfunction and chronic M/S strain. (CX 8, p. 72). Claimant described his severe pain as sharp, dull, burning, aching, throbbing, tingling, stabbing and spasm. *Id*. at 63. The pain was both constant and intermittent and made worse on movement. *Id*. Claimant also related that his pain made it difficult for him to do just about anything, but pain medications of Oxycontin, Lorcet 10, and Celebrex helped. *Id*. Dr. Fortier-Benson's impression on July 28, 2000, was that Claimant suffered from post-laminectomy pain syndrome, L5-S1 radiculopathy, spinal stenosis, SI joint dysfunction and facet joint dysfunction. *Id*. at 61. On August 16, 2000, Fortier-Benson referred Claimant to an orthopedist, Dr. Whitecloud for an independent medical examination to determine if there was some stenosis of the formen at L5-S1. *Id*. Dr. Fortier-Benson's new impression was that Claimant had degenerative disc disease and lumbosacral neuralgia. *Id*.

On September 11, 2000, Claimant returned to Dr. Fortier-Benson, rating his pain level as a "seven." (CX 8, p. 54). After reviewing MRI and EMG tests, Dr. Fortier-Benson stated on September 18, 2000, that Claimant has a degenerative herniated disc at L5-S1 and had evidence of lumbosacral radiculopathy most prominently in the S1 root. *Id*. at 46. If Claimant decided to have surgery, Dr. Fortier-Benson recommended a transverse lumbar inter-body fusion at L5-S1. *Id*. at 47.

Accordingly the nature of Claimant's injury is that Claimant suffers from post operative surgery for a herniated nucleus pulposus at L5, left side, encroaching S1 root, which consisted of a laminectomy and discectomy, L5 disc, left side with S1 nerve root decompression. Following that surgery, Claimant still had narrowing of the L5 disc and residual scar tissue around the L5-S1 disc. *Id*. at 13. Following Claimant work-place accident on September 15, 1999, he suffered from nerve root irritation to the lumbar spine, or L5-S1 polyradiculopathy. Claimant's condition further deteriorated and Dr. Fortier-Benson opined that Claimant has degenerative disc disease and lumbosacral neuralgia as well as a degenerative herniated disc at L5-S1 and lumbosacral radiculopathy most prominently in the S1 root. Three physicians recommend further surgery consisting of either: an L5-S1 fusion using threaded cages to relieve problems with the S1 nerve root; a total laminectomy with expiration of the S1 nerve roots on both sides, and a fusion at L5-S1 using of spine plates; or a transverse lumbar inter-body fusion at L5-S1, all of which only have a fifty percent chance of improving Claimant's condition.

B(2) Extent of Claimant's Disability

Following a laminectomy and a discectomy, L5 disc, left side with S1 nerve root decompression, in May 1996, Dr. Drake issued permanent work restrictions consisting of no lifting over fifty pounds on an infrequent basis and no lifting over twenty-five pounds on a frequent basis. (CX 3, p. 11-12). Claimant suffered from a five percent whole body permanent disability. (CX 3, p. 1).

On September 23, 1999, Claimant was again treated by Dr. Drake after suffering a work place accident moving heavy bags of soda ash. (CX 3, p. 14). On January 8, 1999, Dr. Drake explained

to Claimant that surgery only had a fifty percent chance of improving his condition, but such a procedure was reasonable if he was having intractable pain. *Id*. at 19.

Douglas G. Roll conducted a functional capacity evaluation on January 25, 2000. (CX 6, p. 1). Mr. Roll indicated that Claimant neither gave his maximum effort nor did he engage in symptom magnification. *Id*. Considering positive neurological signs during testing for pain in the L4 -S1 region, Mr. Roll attributed Claimant's poor effort and self-limited performance to that condition. *Id*. The results of the exam revealed that Claimant could lift fifteen pounds and carry twenty pounds, and push/pull forty-five to fifty ponds. *Id*. at 1-2. For non-material handling tasks, Claimant could bend, squat, kneel, crawl, stand, walk, climb stairs and climb ladders on a frequent basis. *Id*. at 2. Claimant could balance and sit on a continuous basis. *Id*.

Following the functional capacity evaluation, Dr. Drake noted on February 3, 2000, that he felt that Claimant was capable of lifting more than fifteen pounds, but opined that he was not a good candidate for continued employment at Employer's facility. (CX 3, p. 20). Specifically, Claimant bending, stooping, squatting, crawling and kneeling should be limited, not over one to two hours out of an eight hour day and his work should be light. *Id*. Claimant was capable of lifting ten pounds frequently and lifting a maximum of twenty pounds. *Id*. On September 14, 2000, Dr. Drake authored a letter which listed Claimant as having a whole body impairment of twenty percent as a result of his September 15, 1999 work-place injury, which included Claimant impairment rating from his earlier workplace injury on May 15, 1996. *Id*. at 1.

On June 8, 2000, Claimant described his pain to Dr. Fortier-Benson as sharp, dull, burning, aching, throbbing, tingling, stabbing and spasm. (CX 8, p. 63). The pain was both constant and intermittent and made worse on movement. *Id*. Claimant also related that his pain made it difficult for him to do just about anything, but pain medications of Oxycontin, Lorcet 10, and Celebrex helped. *Id*. Use of these drugs causes Claimant to act childish and affects his concentration. (Tr. 73).

Throughout the fall and winter of 2000-01, Claimant periodically visited Dr. Fortier-Benson's office, consistently rating his pain between five and seven on a zero to ten scale. (CX 8, p. 37, 45, 54, 56). By August 2001, Claimant experienced increased pain, rating it a "seven to eight," and he was scheduled for injection therapy which decreased his pain level back to "five." (CX 8, p.30-31, 34). By October 22, 2001, Claimant stated that he was working some, and by November 28, 2001, although experiencing an increase in pain levels, Claimant felt as if he was functioning. (CX 8, p. 23, 26). On January 2, 2002, Claimant rated his pain a "four" and reported improved activities of daily living. *Id*. at 20. Nevertheless, Claimant testified that he was no longer active in sports, he had trouble sleeping, stress in his marriage, and depression all because of his chronic pain. (Tr. 45). Claimant is no longer able to perform many of his former tasks such as working on old automobiles. (Tr. 45).

Accordingly, the extent of Claimant's injury is such that Claimant should avoid bending, stooping, squatting, crawling and kneeling more than one to two hours out of an eight hour day, and Claimant should avoid lifting more than ten pounds frequently and never lift more than twenty pounds. Claimant has a whole body impairment rating of twenty percent. Claimant also suffers from

chronic severe pain, self rated between "four" and "eight" on a ten point scale that prevents him from participating in sports, performing old hobbies, sleeping, and which causes stress in his marriage as well as depression. Controlling his pain levels with prescription drugs sometimes makes Claimant act like a child and impairs his ability to concentrate.

C. Prima Facie Case of Total Disability and Suitable Alternative Employment

C(1) Prima Facie Case of Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a prima facie case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 156 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, Office of Worker's Comp. Programs*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). In this case there is no dispute that Claimant cannot perform his former longshore job as a combination electrician and that Claimant established a *prima facie* case of total disability.

C(2) Suitable Alternative Employment

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996); *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Vessel Repair, Inc.*, 168 F.3d at 194 (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991)(crediting employee's statement that he would have constant pain in performing another job). An Employer may establish suitable alternative employment retroactively to the day Claimant reached maximum medical improvement. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). Employer may also establish suitable alternative employment by offering the claimant a position within its facility so long as it does not constitute sheltered employment. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

> Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc.., what can the claimant physically and mentally do following his injury, that is, what types of jobs is the capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted).

C(2)(A) Suitability of Job in Employer's Facility

Here, Employer offered Claimant a job at its facility within the work restrictions set by Dr. Drake. (Tr. 77, 118; EX 9, p. 6; EX 12). Claimant, however, contends that his chronic pain and the nature of the work, even if technically falling into the work restrictions set by Dr. Drake, prevents him for performing the job. Claimant effectively summarized his position in a plea to Dr. Drake to change his work restrictions:

> The damaged lines are brought in and dumped into a big bin that is 4'x4'x4' deep. My job would be to pull them out of the bin, untangle them, drag them into the shop area, and repair or rebuild them. The job requires lots of bending, twisting, walking, pulling, and dragging. It takes a good deal of upper body strength to undo the nuts and bolts that hold the welding equipment together. I used to be good at working like this but from the way my legs and back feel, I cannot do this work anymore without pain and difficulty. . . . [I] worked from February 14th through March 1st. . . . My left leg and foot bothered me quite a lot, not to mention pain in my lower back. I was unable to get a good night sleep during the entire period. . . . I absolutely could not bear the pain in my low back. I could not continue the job and I could not even walk out of there if I wanted to.

(EX 11. p.2).

In the case of *Mijangos v. Avondale Shipyards*, 948 F.2d 941, 944-45 (5th Cir. 1991), the Fifth Circuit determined that and ALJ rationally credited an injured worker's reports of pain in finding that the worker was totally and permanently disabled. The employer produced medical evidence revealing the claimant's work limitations, and listed jobs in its facility specifically tailored to those restrictions which were not controverted by any medical experts. *Mijangos v. Avondale Shipyards*,

19 BRBS 15, 18-19 (1986). Even though the alternative employment fell within the claimant's medical limitations, the ALJ credited the claimant's reports of pain and determined that "even the least taxing jobs identified by employer would not allow claimant the flexibility to work given his testimony as to excruciating and constant pain." *Id*. at 19.

Similar to *Mijangos*, Claimant was provided a job by Employer, tailored to his work restrictions, at Employer's facility, and just like *Mijangos*, Claimant alleges that his severe pain prevents him from performing his assigned job. Three different doctors have recommended that Claimant undergo surgery. (CX 3, p. 17,18; CX 8, p. 47). Refusal to undergo the recommended lumbar surgery is not unreasonable in light of Dr. Drake's prediction that surgery only had a fifty percent chance of improving Claimant's condition. (CX 3, p. 19). Likewise, Claimant's reports of intractable pain are consistent and well documented throughout the record. (CX 6, p. 1; CX 8, p. 20, 29, 34, 37, 45, 54, 56). I also note that Claimant attempted to perform the job provided to him by Employer for two weeks prior to re-injuring his back and having to exit the facility in an ambulance. (Tr. 38-39). By "voluntarily" leaving, Claimant gave up ten years of seniority. (EX 10, p. 1). Additionally, Ms. Wiley, the Employee Relations Representative, stated that her information concerning the job's suitability for Claimant was based on the reports of Mr. Walker, the Department of Labor vocational counselor. (Tr. 87). Mr. Walker, however, never had the opportunity to view Claimant performing his job and based his information on an inspection of the work station and a conversation with Robert Haygood, a co-worker. (Tr. 107-08). Mr. Haygood stated in his deposition that Claimant's position "was not a straining-type job." (EX 17, p. 5-7). Mr. Haygood, however, was on light duty due to a "cracked elbow" and his version of a "straining-type" activity may well be different than Claimant's, who suffers from problems associated with his S1 nerve root.

Unlike *Mijangos*, I do not find that Claimant made a credible witness at trial as there were several problems with Claimant exaggerating the work he was doing prior to his September 1999 injury, misrepresenting the facts about the availability of the hook, exaggerating his diligence in searching for work, and problems with evasive answers concerning his air-conditioning business and rental properties. *See supra*, Part B. Nevertheless, I do not find that Clamant's less than credible testimony detracted from his documented inability to perform the whip repair job for the above stated reasons. Accordingly, like *Mijangos*, I credit Claimant's reports of pain, inasmuch as they are verifiable by consistent medical evidence and the course of events leading up to trial. Therefore, even though Claimant's job fell within the work restrictions set by Dr. Drake, I find that it was unsuitable due to Claimant's intractable pain.

C(2)(B) Suitability of Other Jobs

As discussed, *supra*, the extent of Claimant's injury is such that Claimant should avoid bending, stooping, squatting, crawling and kneeling more than one to two hours out of an eight hour day, and Claimant should avoid lifting more than ten pounds frequently and never lifting more than twenty pounds. Claimant has a whole body impairment rating of twenty percent, and suffers from chronic severe pain, self rated between "four" and "eight" on a ten point scale, which is controlled by prescription drugs. Claimant stated that his impairments prevent him from performing many

former activities and stated that use of the prescription drugs impaired his ability to concentrate. Nevertheless, Claimant testified that he was able to perform some work as evidenced by his maintenance of rental property and attempts to start his own air-conditioning business.[2] (Tr. 43, 53-54).

Based on Claimant's restrictions as set forth by Dr. Drake, and considering Claimant's age, education, and prior work history, Tommy Sanders, Employer's vocational counselor, identified alternative employment. All jobs were reasonably available in Claimant's locality. In February 2000, Mr. Sanders identified the following jobs that were available and fell within Claimant's work restrictions.

Coastal Energy	Booth Cashier	$5.25	
Pinkerton Security	Security Guard		$5.25

(EX 10, p. 3).

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[2] Claimant testified that he had no earnings from his attempt to start an air conditioning business. While the amount of monthly rentals was elicited at trial, there was no evidence on how much, if any, of the rentals were profit and how much money, if any, Claimant earned performing maintenance on his rental property. Accordingly, I do not find that Employer is entitled for a credit for wages earned by Claimant prior to Employer showing suitable alternative employment. *Carter v. General Elevator Co.*, 14 BRBS 90, 98 n.1 (1981)(stating that the Act does not contain any specific credit provision entitling an employer to offset sums a claimant earned from another employer, but, instead of awarding a credit, "the proper procedure is for the administrative law judge to award temporary total disability benefits from the time claimant did not work, punctuated by temporary partial awards for the time claimant was engaged in part-time employment."); *Turk v. Eastern Shore Railroad*, 33 BRBS 468 (1999)(ALJ)(same).

Related to the credit provisions under the Act and voluntary employment by a claimant is Section 8(j), which permits an employer to request a claimant to report his post-injury earnings against the penalty of forfeiture of compensation for under-reporting or failing to report. 33 U.S.C. § 908(j) (2001). To invoke that provision, however, the employer must first require that the former employee file such a report. 33 U.S.C. § 908(j)(1-2) (2001); *Hundley v. Newport News Shipbuilding and Dry Dock Co.*, 1998 WL 850137, *5 (DOL BenRev. Bd. 1998)(stating that both the Senate bill and the House amendment to Section 8(j) contemplated that employers would have authority "to require employees receiving compensation to submit a statement of earnings not more frequently than semi-annually."). Here, the Employer submitted to Claimant an LS-200, Report of Earnings Form, signed by Claimant on May 8, 2001, which indicated that Claimant was not working and had no earnings. (EX 18, p. 2). As noted above there is no clear evidence that Claimant was earning any money during this time period and Employer is not entitled to invoke the forfeiture provisions of Section 8(j).

Mr. Sanders stated that the job with Coastal Energy required Claimant to occasionally lift five to ten pounds and Claimant could sit, stand, walk and the job only involved limited low back activity, kneeling and squatting. *Id*. Identifying the same job on May 11, 2001, however, Mr. Sanders related that it entailed "occasional" bending and stooping. As defined by the DICTIONARY OF OCCUPATIONAL TITLES 4th Ed. Rev. 1991, Appendix C, "occasional" means an activity that exist up to one-third of the time. Because the job may require Claimant to bend and stoop approximately 2.6 hours in an eight hour day, I find that this job violates Dr. Drakes restriction of no bending or stooping more than one to two hours in an eight hour day. The Pinkerton Security job entailed walking twenty to thirty minutes, lifting three to five ponds and low back activity was limited. I find that security job constitute suitable alternative employment at the rate of $5.25 per hour.

On May 23, 2000, Mr. Sanders conducted a second hypothetical vocational assessment and a labor market survey identifying the following jobs:

Country Inn and Suites	Night Auditor Trainee	$6.00
Pinkerton Security	Gate Guard	$5.90
Burins International Security	Security Guard	$7.50

(EX 10, p. 2-3).

The job at Country Inn and Suites was a trainee position that require Claimant to learn how to verify balance entries and records of financial transactions, use an adding machine, calculator, keyboard, and would require Claimant to register guests and assign rooms. *Id*. at 2. Lifting was limited to ten pounds with occasional standing/walking, occasional bending/stooping and frequent sitting/handling. *Id*. I find that this job is not suitable because, like the position as a both attendant, "occasional" bending and stooping violates the work restrictions set by Dr. Drake.

Similarly, the job at Pinkerton Security as a Gate Guard is described as entailing occasional climbing, which would seem to violate Dr. Drake's restrictions. However, Mr. Sanders further elaborated that "occasional" in this context meant that Claimant would have to climb approximately twenty stairs during a shift. Accordingly, I find that this job constitutes suitable alternative employment. Likewise, I find that the job as a security guard for Bruins International Security is also suitable. Therefore, I find that Employer established suitable alternative employment on May 23, 2000, at the rate of $6.70 per hour.[3]

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[3] When an employer presents several different jobs that are available to a claimant, or when a claimant has worked several different jobs, it is appropriate to average the earnings to arrive at a fair and reasonable estimate of the claimant's earning potential. *Avondale Industries, Inc. v. Pulliam*, 137 F 3d. 326, 328 (5th Cir. 1998)(finding that averaging several jobs offered by an employer was appropriate because the court has no way of determining which job the claimant will obtain and the average wage reflects all those jobs that are available); *Shell Offshore Inc. v. Cafiero*, 122 F.2d 312, 318 (5th Cir. 1997)(holding that averaging was a reasonable method to calculate a claimant's post-injury earning capacity).

Finally, on May 11, 2001, Mr. Sanders performed a third labor market survey identifying the following positions:

Pinkerton Security	Security Guard	$6.50
American Citadel	Security Guard	$7.00
Coastal Energy	Booth Attendant	$6.15
Cowboy Maloney	Sales Representative	$650 every two weeks

(EX 10, p. 5).

Of the above jobs, I find that the two security positions constitute suitable alternative employment as they require negligible lifting bending and stooping with the ability to alternatively sit and stand during the course of the work day. As discussed *supra*, the job as a both attendant for Coastal Energy is not suitable because it requires "occasional" bending and stooping that would violate Dr. Drake's work restrictions. Likewise, the job at Cowboy Maloney is not suitable because Mr. Sanders was unable to determine the physical demands of the job. (CX 10, p. 5). Accordingly, Employer established suitable alternative employment on May 11, 2001 at the rate of $6.75 per hour.

C(2)(C) Diligence

A claimant may rebut evidence of suitable alternative employment if he demonstrates that he diligently searched for a job but was unable to obtain a position. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222 (5th Cir. 2001); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1040 (5th Cir, 1981). A diligent job search "involves an industrious, assiduous effort to find a job by one who conveys an impression to potential employers that he really wants to work." *Livingston v. Jacksonville Shipyards, Inc.*, 33 BRBS 524, 526 (ALJ). The claimant need not prove that he was turned down for the exact jobs that the employer showed were available, but must demonstrate diligence in attempting to secure a job within the compass of opportunities that the employer reasonably showed were available. *Palombo v. Director, OWCP*, 937 F.2d 70, 74 (2nd Cir. 1991).

Here, Claimant applied for jobs at: Coastal Energy, Fast Lane, Isle of Capri Casino, and New Place Casino on April 25, 2001. (CX 9, p. 1). Between January 2-3, 2002, Claimant applied for jobs at: Lowes, Blockbuster, Bailey Home Center, K-Mart and Boomtown Casino. *Id*. at 2. Claimant also testified that he made several informal inquiries but was unsuccessful in finding any employment leads. (Tr. 44). Claimant was not hired for any position. (Tr. 44).

In *Emerson v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 239, 244 (1999)(ALJ), the court found that the claimant conducted a diligent job search when and was unable to secure employment, despite the availability of suitable alternative employment, when the claimant lived in a remote area where there was little business and industry, and where employment of any type was difficult to obtain. Additionally, having physical limitations on the type of employment the claimant was capable of performing inhibited full participation in the already limited and competitive job market. *Id*. The ALJ noted that claimant was compliant with a rehabilitation placement program

and attempted to apply for eleven jobs, some on his own initiative. *Id*.

In *Martin v. Marine Terminals Corp.*, 32 BRBS 338, 340 (1998)(ALJ), the judge determined that the claimant performed a diligent job search by submitting a list of twenty-four prospective employers that he contacted over a four month period. The claimant inquired about job opportunities, sent resumes and applications to prospective employers, and conducted follow-up inquires to a vast range of potential employers that adequately covered the compass of employment opportunities that the employer showed were available. *Id*. The claimant also produced evidence that employers would not offer him a job because his injury necessitated the use of a cane and the judge credited the claimant's sincerity in wanting to find employment to support his family. *Id*.

Unlike *Emerson*, Claimant, who lives in Ocean Springs, Mississippi, does not live in an rural, economically depressed area with little or no employment opportunities. Unlike *Martin*, Claimant only submitted nine employment applications and there is no evidence that Claimant conducted any follow-up inquires. Also unlike *Martin*, Claimant was not faced with a great need to support his family as his wife works and he co-owns several pieces of real property. Furthermore, Claimant testified that he had several applications sitting at home for different places but had never filled them out. (Tr. 64). Claimant did state that he applied to several places "by word of mouth" but had no documentation to support that fact and due to Claimant's questionable credibility I give this statement little weight. (Tr. 64). The only documented application were dated April 25, 2001, and January 2-3, 2002. Based on all the evidence presented, I do not find that Claimant conducted a diligent job search.

D. Section 8(f)

Section 8(f) shifts a portion of the liability for permanent partial and permanent total disability from the employer to the Special Fund established by Section 44 of the Act, when the disability was not due solely to the injury which is the subject of the claim. Section 8(f) is, therefore, invoked in situations where the work-related injury combines with a pre-existing partial disability to result in a greater permanent disability than would have been caused by the injury alone. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144 (9th Cir. 1991). Relief is not available for temporary disability, no matter how severe. *Jenkins v. Kaiser Aluminum & Chemical Sales*, 17 BRBS 183, 187 (1985). Most frequently, where Section 8(f) is applicable, it works to effectively limit the employer's liability to 104 weeks of compensation. Thereafter, the Special Fund makes the compensation payments.

To show entitlement to Section 8(f) relief an employer must present evidence on three different requirements: (1) that the claimant had a pre-existing permanent disability; (2) that this partial disability was manifest to the employer; and (3) that it rendered the second injury more serious than it otherwise would have been. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 309 (D.C. Cir. 1990). In cases of permanent partial disability the employer must also show that the claimant sustained a new injury, *Jacksonville Shipyards v. Director, OWCP*, 851 F.2d 1314, 1316-17 (11th Cir. 1988), and the current disability must be materially and substantially greater than that which

would have resulted from the new injury alone. *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884 (5th Cir. 1997); *Director, OWCP v. Ingalls Shipbuilding, Inc.*, 125 F.3d 303, 307 (5th Cir. 1997). In establishing the occurrence of a second injury to the employee, it has been clearly established that a work-related aggravation of an existing injury constitutes a compensable injury for purposes of section 8(f). *Ashley v. Tide Shipyard Corp.*, 10 BRBS 42, 44 (1978); *Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir. 1991), *aff'g* 22 BRBS 453 (1989).

D(1) Claimant's Pre-Existing Permanent Partial Disability

In 1995, Claimant suffered a back injury, while working for Employer when he fell to the bottom of a stairwell carrying telephone cable. (Tr. 21). On April 24, 1995, Claimant began treatment with Dr. Drake, an orthopaedic surgeon, in regards to his injury and complaints of lower back pain. (CX 3, p. 3). Dr. Drake's impression was that Claimant had "mild degenerative disc disease L-5 disc, lumbar spine" and lumbosacral strain. *Id*. at 4. Claimant was unable to recover after conservative treatment and on May 15, 1996, Claimant was admitted to the hospital with a final diagnosis of a herniated nucleus pulposus at L5, left side, encroaching S1 root, and underwent a laminectomy and discectomy, L5 disc, left side with S1 nerve root decompression. *Id*. at 11. On July 22, 1996, Dr. Drake authorized Claimant to return to work and on January 10, 1997, Dr. Drake issued permanent restrictions of no lifting over fifty pounds on an infrequent basis and no lifting over twenty-five pounds on a frequent basis. *Id*. at 12. Claimant had a five percent permanent partial impairment to his whole body. *Id*. at 1.

D(2) Extent of Claimant's Subsequent Injury Alone

Claimant's current injury occurred on September 15, 1999 while working in the water treatment purification facility unloading pallets containing eighty pound bags of soda ash. (Tr. 23). While moving a bag, Claimant experienced shooting pains, quit lifting, and made an appointment to see Dr. Drake. (Tr. 24). After an EMG and nerve conduction study, Dr. Drake opined on November 22, 1999, that the findings were consistent with L5-S1 polyradiculopathy. *Id*. at 17. Because the pain was intolerable and Claimant could not work, Dr. Drake recommended an L5-S1 fusion using threaded cages to relieve problems with the S1 nerve root. *Id*. A second opinion physician, Dr. Charlie Winters, also recommended a total laminectomy with expiration of the S1 nerve roots on both sides, and a fusion at L5-S1 using spine plates instead of threaded cages. *Id*. at 18. Claimant, however, elected not to undergo the recommended surgery.

Following a functional capacity evaluation, Dr. Drake noted on February 3, 2000, that he felt that Claimant was capable of lifting more than fifteen pounds, but opined that he was not a good candidate for continued employment at Employer's facility. (CX 3, p. 20). Specifically, Claimant's bending, stooping, squatting, crawling and kneeling should be limited, not over one to two hours out of an eight hour day and his work should be light. *Id*. Claimant was capable of lifting ten pounds frequently and lifting a maximum of twenty pounds. *Id*. On September 14, 2000, Dr. Drake authored a letter which listed Claimant as having a whole body impairment of twenty percent as a

result of his September 15, 1999 work-place injury, which included Claimant impairment rating from his earlier workplace injury on May 15, 1996. *Id*. at 1.

D(3) The Relationship Between Claimant's Existing Permanent Partial Disability and Subsequent Injury

As noted *supra*, both Claimant's injuries involved the L5 disc and the S1 nerve. Accordingly, Claimant's September 15, 1999 injury overlaid a pre-existing condition. Based on the medical records of Dr. Drake, Claimant's 1999 injury created a more extensive problem for Claimant that existed after the 1995 lumbar injury, and as such I find that the second injury represents far more than the natural progression of the1995 injury. Likewise, Claimant's subjective complaints reveal that after the 1995 injury he was able to effectively maintain employment, whereas Claimant now contends that his subjective pain level prevents him from performing any meaningful activity. Therefore, the 1999 injury, while not the root cause of all of Claimant's impairments, overlaid and aggravated a significant pre-existing condition to such an extent that Claimant was unable to return to his former employment following the 1999 injury.

D(4) Determining Whether Claimant's Current Permanent Partial Disability is Due Solely to the Subsequent Injury or Whether the Pre-Existing Injury Materially and Substantially Contributes to Claimant's Current Disability.

As noted *supra*, Claimant's disabilities due to the 1995 lumbar injury resulted in a permanent partial whole body impairment of five percent. Following that injury, Claimant was able to work full time. After his lumbar injury in 1999, Claimant was unable to perform his former employment, was issued permanent restrictions of no lifting over twenty pounds with limited bending and stooping, and Claimant was assigned a permanent partial whole body impairment of twenty percent that included his earlier injury. Accordingly, I find that five percent of Claimant's permanent partial disability is due to his previous injury and fifteen percent of his permanent partial disability is due to his subsequent injury. Therefore, I am convinced that the new injury did not, by itself, contribute solely to Claimant's current restrictions, but rather exacerbated previously existing lumbar conditions, so as to render Claimant more disabled than he would have been had there been no prior lumbar impairments. The additional restrictions imposed on Claimant following his 1999 injury constituted a substantially and materially greater work limitation increasing or contributing to Claimant's overall disability thus satisfying the "contribution" element of Section 8(f). Accordingly I find that Employer is entitled to Section 8(f) relief.

E. Conclusion

I find that Claimant is a less than credible witness based off discrepancies in his trial testimony. Claimant suffers from post-operative surgery for a herniated nucleus pulposus at L5, left side, encroaching S1 root, which consisted of a laminectomy and discectomy, L5 disc, left side with S1 nerve root decompression, and was assigned a five percent whole body impairment. Following Claimant work-place accident on September 15, 1999, he suffered from nerve root irritation to the

lumbar spine, or L5-S1 polyradiculopathy, degenerative disc disease, lumbosacral neuralgia as well as a degenerative herniated disc at L5-S1. Claimant reasonably refused to undergo recommended surgery and as a result he reached maximum medical improvement on February 3, 2000, with permanent restrictions of no bending, stooping, squatting, crawling and kneeling more than one to two hours out of an eight hour day, no lifting more than ten pounds frequently and no lifting over twenty pounds. With a whole body impairment rating of twenty percent, Claimant suffers from chronic severe pain, and the use of prescription drugs to control that pain affects Claimant's behavior and ability to concentrate. The fact that Clamant cannot perform his former job is not in dispute, and Claimant proved that he could not perform the job Employer provided in its facility. Employer successfully demonstrated suitable alternative employment during February 2000 at $5.25 per hour, on May 23, 2000 at $6.70 per hour and on May 11, 2001 at $6.75 per hour. Claimant failed to show diligence to rebut Employer's evidence of suitable alternative employment. Employer proved its entitlement to Section 8(f) relief with five percent of his whole body impairment related to his pre-existing injury and fifteen percent of his whole body impairment related to the September 1999 work place accident.

F. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills."[4] *Grant v. Portland Stevedoring Company, et al.*, 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

G. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet

[4] Since the 52 week Treasury Bills are no longer auctioned, interest is now based on the 52 week average of "one year constant maturity Treasury yield" for the calendar week preceding the service date on the Order.

showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from September 16, 1999 to February 3, 2000 based on an average weekly wage of $531.10 per week with a corresponding compensation rate of $354.07.

2. Employer shall pay to Claimant permanent partial disability compensation pursuant to Section 908(c)(21) of the Act based on two-thirds of the difference between Claimant's pre-injury wage earning capacity of $531.10, and his post-injury earning capacity of $210.00, or $214.07 per week from February 4, 2000 to May 23, 2000.

3. Employer shall pay to Claimant permanent partial disability compensation pursuant to Section 908(c)(21) of the Act based on two-thirds of the difference between Claimant's pre-injury wage earning capacity of $531.10, and his post-injury earning capacity of $268.00, or $175.40 per week from May 24, 2000 to May 11, 2001.

4. Employer shall pay to Claimant permanent partial disability compensation pursuant to Section 908(c)(21) of the Act based on two-thirds of the difference between Claimant's pre-injury wage earning capacity of $531.10, and his post-injury earning capacity of $270.00, or $174.07 per week from May 11, 2001, and continuing.

5. Employer shall be entitled to a credit for all compensation paid to Claimant after September 15, 1999.

6. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

7. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

8. Employer is entitled to Section 8(f) relief commencing on February 4, 2002. (104 weeks after reaching maximum medical improvement and having a permanent partial disability).

9. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A
CLEMENT J. KENNINGTON
Administrative Law Judge